

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
SUBSTANTIAL DEVELOPMENT PERMIT  
ISSUED BY THE TOWN OF STEILACOOM  
TO BURLINGTON NORTHERN, INC.,

EARL HILDAHL, CLYDE H. MARTIN,  
and GAIL JOHNSON,

Appellants,

v.

TOWN OF STEILACOOM and  
BURLINGTON NORTHERN, INC.,

Respondents.

SHB Nos. 80-33, 80-34  
& 80-35

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a shoreline substantial development permit issued by the Town of Steilacoom to Burlington Northern, Inc., came on for hearing before the Shorelines Hearings Board, Nat W. Washington, Chairman, Rodney Kerslake, Member, A. M. O'Meara, Member and Steve Tilley, Member, convened at Lacey, Washington, on February 19 and 20, and March 12 and 13, 1981. William A. Harrison,

1 Administrative Law Judge, presided.

2 Appellants appeared by their attorney, Patrick Biggs. Respondent  
3 Town of Steilacoom appeared by its attorney, Edwin J. Wheeler.  
4 Respondent Burlington Northern, Inc., appeared by its attorney, Gerald  
5 A. Troy. Reporters Kimberly Beyette, Diane Lachman and Betty Koharski  
6 recorded the proceedings.

7 Witnesses were sworn and testified. Exhibits were examined. From  
8 testimony heard and exhibits examined, the Shorelines Hearings Board  
9 makes these

10 FINDINGS OF FACT

11 I

12 The shoreline here in question is an inlet of approximately three  
13 acres within the limits of the Town of Steilacoom. Known as the Fifth  
14 Street Embayment, the inlet is both filled with water and emptied of  
15 it by the tidal cycle of Puget Sound. The shoreline is not one of  
16 state wide significance.

17 Since 1914, the inlet has been traversed by the railroad tracks of  
18 the respondent, Burlington Northern, Inc., or its predecessors. Now,  
19 as in the past, these tracks are the main rail line between Seattle  
20 and Portland or points beyond. Both Burlington Northern and Union  
21 Pacific transport freight over the line. Amtrack transports  
22 passengers over the line. From 34 to 40 trains cross the inlet each  
23 day transporting an average of 795 passengers and 74,197 tons of  
24 freight. There are presently two tracks which cross the 513 foot  
25 mouth of the inlet. These are supported by the original 1914 wooden

26 FINAL FINDINGS OF FACT,  
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1 trestle which has been rebuilt over the years including addition of  
2 newer wooden piers in the intervals between the original wooden piers.

3 The tidelands in the inlet have been platted, and are for the most  
4 part in private ownership. Fifth Street, as built, terminates at a  
5 steep bluff at the rear of the inlet, but continues unbuilt through  
6 the inlet according to the scheme of the plat. Appellants reside on  
7 the higher ground adjacent to the inlet but frequently walk down to it  
8 as a means of recreation. Appellant Johnson owns tidelands within the  
9 inlet. On these there is a wooden boathouse constructed on fill  
10 scraped from the floor of the inlet. The boathouse is protected by  
11 wood pile bulkheads. Appellant has used this boathouse for commercial  
12 boat building and repair in the past, and proposes to do so in the  
13 future. Appellant has also used the boathouse as a station to saw  
14 logs brought into the inlet. Other owners of private tidelands have  
15 constructed wooden sheds and extensive bulkheading within the inlet.

16 A 30 inch-diameter storm water drainage pipe is located at the  
17 rear of the inlet, and serves as the terminus of the Town's drainage  
18 system for approximately 850 upland acres.

## 19 II

20 In 1972, Burlington Northern, Inc., (hereafter BN) applied to the  
21 Town of Steilacoom (hereafter Town) for a shoreline substantial  
22 development permit. The 1972 proposal was to replace the existing 513  
23 foot wooden bridge with two segments of fill totaling 405 feet  
24 connected in the middle by a 108 foot steel and concrete bridge. The  
25 Town denied this application, and BN appealed to this Board in our

1 SHB No. 40. This Board reversed the Town and remanded with  
2 instructions including compliance with the State Environmental Policy  
3 Act, chapter 43.21C RCW.

4 Following remand, the Town considered what is called the "Norman"  
5 environmental impact statement and granted a substantial development  
6 permit allowing replacement of the wooden trestle so long as no fill  
7 was used. BN did not proceed under this permit. Instead, after  
8 commissioning further study of the inlet, BN made a new application to  
9 the Town proposing to replace the existing 513 foot wooden bridge with  
10 two segments of fill totaling only 259 feet connected by a longer  
11 bridge of 254 feet. After considering the supplemental "Dearborn"  
12 environmental impact statement, the Town granted a shoreline  
13 substantial development permit for this proposal. From this,  
14 appellant residents now appeal. The relief requested by appellants is  
15 that BN's permit be conditioned by a prohibition against fill, not  
16 that replacement of the wooden bridge be prohibited per se.

17 III

18 On December 18, 1973, the Town gave "preliminary approval" to a  
19 shoreline master program containing goals, policies and environmental  
20 designations but no use regulations nor provision for a permit  
21 system. The missing elements were to be adopted before June 1, 1974.  
22 In fact, the missing elements were not adopted by June 1, 1974. The  
23 Department of Ecology declined to exercise its authority to either  
24 approve or disapprove the half measure taken by the Town while it was  
25 thus incomplete.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER

1 This was the state of affairs when, on August 7, 1979, BN filed  
2 its application for the substantial development permit now before us  
3 (254 foot bridge/259 foot fill). Next, in May 1980 there emerged a  
4 draft master program which broadly re-worded the topics covered in the  
5 1973 version and added use regulations as well. Although the 1973  
6 version was adopted by the formality of a Town resolution (No. 439),  
7 no retraction or repealer of that resolution was placed in evidence  
8 before us. Another draft followed in August 1980. This was the draft  
9 in existence when, on September 23, 1980, the Town granted the  
10 substantial development permit now before us (254 foot bridge/259 foot  
11 fill). Thereafter, largely at the request of the Town Council,  
12 another draft was developed in December 1980 and another in February  
13 1981. A final draft shoreline master program was adopted by the Town  
14 in February 1981.

15 The August 1980 draft in existence at the date of permit issuance  
16 divided the entire shoreline of the Town into two environments: 1)  
17 conservancy and 2) commercial waterfront. All draft master programs  
18 submitted in evidence before us designated the inlet as conservancy.  
19 Conversely, however, the use regulations particularly pertinent to  
20 this appeal, namely those for "landfill" and "transportation  
21 facilities", are so written as to apply identically whether the  
22 subject environment is conservancy or commercial waterfront. This is  
23 the case in all master program drafts which contain use regulations.

24 We therefore begin our analysis by reviewing the use regulations.  
25 The August 1980 draft master program provides a use regulation for  
26 landfill at page 23:

1           LANDFILLS

2           1. Landfills shall be permitted for water-dependent  
3           or public uses only when the applicant can  
            demonstrate that there is no practical alternative.

4           2. Fill materials shall be of such quality that  
5           water quality problems will not be created.  
6           Shoreline areas shall not be used for sanitary  
            landfills or the disposal of solid waste.

7           3. The perimeters of all landfills shall be provided  
8           with some means to control erosion and contain  
            sediment, such as vegetation or retaining walls.

9           4. Landfills shall be permitted only by conditional  
            use.

10          5. The provisions of this section shall apply to  
11          both commercial waterfron and conservancy  
            designations.

12          With respect to prior and subsequent drafts of the shoreline  
13          master program we find as follows:

14          1. The 1973 preliminary master program contained no use  
15          regulations whatsoever.

16          2. The May 1980 draft master program only gave "priority" to  
17          landfills for water dependent uses and for public uses, in contrast  
18          with the exclusive language of the August 1980 draft in paragraph 1.,  
19          above. The May 1980 draft did not require a showing of "no practical  
20          alternative" as does the August 1980 draft. Neither the May nor  
21          August 1980 draft defined landfill.

22          3. The December 1980 draft master program contains an alternative  
23          environmental designation for the geographical area in question. This  
24          followed the September 16, 1980, meeting of the Town Council in which  
25          Councilman Buchanan suggested consideration of a "new zone." The

1 December 1980 draft and the February 1981 draft both added the word  
2 "transportation" to those uses for which landfill could be permitted.  
3 Both the December 1980 and the February 1981 drafts defined "landfill."

4 Our review of transportation facility use regulations in the  
5 August 1980 and prior and subsequent drafts reveals similar  
6 inconsistencies. Likewise, the underlying generalized goals of the  
7 master program vary through the procession of drafts placed before us.

8 We find that as to both landfill and transportation regulations,  
9 as well as goals and other pertinent topics, each coherent rule  
10 expressed in the draft master program existing when this permit was  
11 issued was materially contradicted or compromised in a prior or  
12 subsequent draft.

#### 13 IV

14 The proposed fill would consist of non-polluting granular material  
15 with rip rap rock encasing it. Built into the northernmost fill there  
16 would be a pedestrian walkway affording public access to the shore at  
17 all times and into the inlet during conditions of low tide. This  
18 walkway, beginning in the public area of the Town ferry terminal,  
19 would greatly enhance public access to the shoreline in question.

#### 20 V

21 The new bridge will consist of nine spans. The center span will  
22 enhance boat access to the inlet by retaining the vertical clearance  
23 afforded by the present wood bridge, and expanding horizontal  
24 clearance from 20 feet to 27 feet.

VI

Both segments of fill together would cover six-tenths (0.6) of an acre. The wider interval of piling in the proposed bridge would increase wave action in the center of the inlet. No increased siltation or algae formation should result in the center of the inlet as a result of the proposed development.

In the wings of the inlet which would lie directly behind the fill, slow deposition of sandy-silt material would occur. This material would originate from the storm drain at the rear of the inlet and would accumulate at the maximum rate of one-tenth to eight tenths (0.1 to 0.8) of a foot per 100 years. Such siltation could be added or removed instantaneously by a storm with or without the proposed development. Although algae species type might change as a consequence of the 100 year siltation described above, algae biomass would be approximately equal to the present condition. The proposed development would probably have no significant effect on the feeding activity of fish entering the inlet and may provide improved shelter. Neither would it significantly affect waterfowl species or small mammals inhabiting the inlet.

The proposed development will not affect the minimal tidal current which circulates into and out of the inlet. Both the present wooden bridge and the proposed development protect the inlet from significant siltation which would enter the inlet from seaward by the process of longshore drift.

1 VII

2 Because the surrounding residences are above beach level, there  
3 will be no diminution of view from these residences seaward. From the  
4 beach level of the inlet the fill coupled with the wide spans of the  
5 proposed development would provide a clearer seaward view than is now  
6 allowed by the rank and file of wooden piling supporting the existing  
7 bridge.

8 VIII

9 Any Conclusion of Law which should be deemed a Finding of Fact is  
10 hereby adopted as such.

11 From these Findings the Board makes these

12 CONCLUSIONS OF LAW

13 I

14 Respondent, BN, challenges the standing of appellant to bring this  
15 request for review. We hold that where, as here, the Department of  
16 Ecology and Attorney General have certified that appellant has valid  
17 reasons to seek review, the appellant is "a person aggrieved" with  
18 standing to request review by this Board under RCW 90.58.180(1).  
19 Moore v. City of Seattle and Kingen, SHB No. 204 and Foulks v. King  
20 Co. and DOT, SHB NO. 80-17. In the alternative, even were  
21 certification not sufficient to confer standing we conclude that  
22 appellant has standing.

23 Standing has been defined as the possession of "a personal stake  
24 in the outcome of the controversy," so that "the dispute sought to be  
25 adjudicated will be presented in an adversary context and in a form

1 historically viewed as capable of judicial resolution." Flast v.  
2 Cohen, 392 U.S. 83, 101 (1968). This is in contrast to "a mere  
3 interest in the problem." United States v. SCRAP, 412 U.S. 669  
4 (1973). Such a stake exists where there is injury in fact to a  
5 personal interest, even though the injury may be suffered by many and  
6 even though such injury may be non-economic. Sierra Club v. Morton,  
7 405 U.S. 727 (1972). Appellants in this matter have shown their  
8 personal use of the shoreline in question for recreational purposes  
9 and also their residence adjacent to or actual ownership of the shore  
10 in question. Appellants have standing to bring this request for  
11 review.

## 12 II

13 Appellants urge that the Town is estopped to grant the substantial  
14 development permit now before us which arises from BN's 1979  
15 application because of the Town's prior positions on BN's 1972  
16 application. These two applications presented separate and distinct  
17 proposals. We therefore conclude that appellants' contention of  
18 estoppel is without merit.<sup>1</sup>

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21  
22 1. Similarly, BN's Motion for Summary Judgment herein which urged  
23 that our decision in SHB No. 40 (relating to the 1972 application)  
24 disposes of this review (relating to the 1979 application) through the  
25 principle of res judicata was denied.

1 III

2 BN contends that its proposed development is excluded from the  
3 definition of "substantial development" found in the Shoreline  
4 Management Act at RCW 90.58.030(3)(e) because it constitutes "repair  
5 and reconstruction." The exclusion, however, extends only to "normal  
6 maintenance or repair." RCW 90.58.030(3)(e)(i). The proposed  
7 development, which replaces the present bridge with one of a different  
8 design, does not meet this or any other exclusion from the definition  
9 of "substantial development." It therefore requires a substantial  
10 development permit. RCW 90.58.140(2).

11 IV

12 Where, as here, a master program has not become effective<sup>2</sup> the  
13 standards which the Board is to apply in reviewing a substantial  
14 development permit are (a) the policy of the Shoreline Management Act,  
15 RCW 90.58.020, (b) the guidelines and regulations of the Department of  
16 Ecology, chapter 173-16 WAC, and (c) "so far as can be ascertained,  
17 the master program being developed for the area." RCW 90.58.140(2)(a).

18 V

19 In determining whether an unapproved shoreline master program is  
20 ascertainable we look to the draft in existence on the date when the  
21 substantial development permit was granted or denied. Lane v. Town of  
22 Gig Harbor, SHB No. 129; Portage Bay-Roanoke Park Comm. Coun. and  
23 Hurlbut v. Seattle, SHB No. 194; DOE v. Poulsbo and Xenos, SHB No.  
24 201. In doing so, however, we will inquire whether the challenged

25  
26 2. A local shoreline master program becomes effective when  
approved by the State Department of Ecology. RCW 90.58.090.

1 requirements were treated consistently in prior and subsequent draft  
2 master programs. Allison Fairview Neighborhood Assoc. v. Seattle and  
3 Jessup, SHB No. 205 and prior cases cited therein.

4 Considering the uncertainty expressed in the sum total of master  
5 program drafts in the evidence before us, as found in Finding of Fact  
6 III above, we conclude that no ascertainable master program existed  
7 for the Town of Steilacoom at the time the permit was issued.

## 8 VI

9 Appellants cite certain Department of Ecology guidelines (chapter  
10 173-16 WAC) as inimical to the proposed development. The guidelines  
11 cited range from specific rules for use activities to overall master  
12 program elements, environments or natural systems.

13 Guidelines for use activities. Appellants first cite the guidelines  
14 relating to landfill. Specifically they draw attention to the  
15 following language therein:

16 WAC 173-16-060  
17 (14) Landfill

18 ...However, most landfills destroy the natural  
19 character of land, create unnatural heavy  
erosion and silting problems and diminish the  
existing water surface. Guidelines:

- 20 a. Shoreline fills or cuts should be designed  
21 and located so that significant damage to  
22 existing ecological values or natural  
23 resources, or alteration of local currents  
will not occur, creating a hazard to  
adjacent life, property and natural  
resource systems.

24 We conclude that the proposed fill is designed and located so that no  
25 significant damage will be done to existing ecological values or

1 natural resources nor will alteration of currents occur creating any  
2 hazard to life, property or natural resource systems. Appellants also  
3 cite the following guideline relating to road and railroad design:

4 WAC 173-16-060

5 (18) Road and railroad design and construction.

6 a. Whenever feasible, railways should be  
7 located away from shorelands.

8 We conclude that relocation of the main line railway in question was  
9 not shown by appellants to be feasible.

10 Guidelines for master program elements, environments and natural  
11 systems. Appellants cite WAC 173-16-040(3)(f) calling for a  
12 conservation element in each master program. We conclude that the  
13 proposed development adequately preserves the scenic vista, the  
14 estuarine area for fish and wildlife protection and the natural  
15 features which are the objects of the policy expressed in that  
16 guideline. Appellant also cites WAC 173-16-040(4)(b)(11) calling for  
17 master programs to designate conservancy environments. Assuming the  
18 applicability of that guideline here, we conclude that existing  
19 natural resources are adequately protected by the proposed  
20 development, and that the flow of recreational benefits to the public  
21 are increased by it. Appellant lastly cites WAC 173-16-050 relating  
22 sandy, rocky and muddy beaches as separate natural systems. We  
23 conclude that the proposed development will not impose a significant  
24 change in the natural character of the beach in question as is the  
25 concern of the cited guideline.

26 The substantial development permit granted by the Town is

1 consistent with the portion of the Department of Ecology guidelines  
2 advanced by the appellants.

3 VII

4 Appellants contend that the proposed development is inconsistent  
5 with the policy of the Shoreline Management Act, RCW 90.58.020. We  
6 disagree. That policy includes "planning for and fostering all  
7 reasonable and appropriate uses" of the shoreline. The proposed  
8 development will enhance public access to the shoreline and navigation  
9 while doing no significant harm to the existing quality of the water,  
10 view, or fish and wildlife.

11 Appellants lastly contend that the proposed fill would be  
12 unaesthetic in appearance. We will not vacate a permit solely on  
13 grounds of aesthetics where, as here, there is neither a refined  
14 master program addressing such matters nor a violation of a specific  
15 aesthetic standard such as height limitation. Portage Bay-Roanoke  
16 Park Comm. Coun. and Hurlbut v. Seattle, SHB No. 194, aff'd  
17 92 Wn.2d 1 (1979).

18 The substantial development permit granted by the Town is  
19 consistent with the policy of the Shoreline Management Act.  
20 RCW 90.58.020.<sup>3</sup>

21  
22 3. Evidence was presented that the proposed development would  
23 cost less to build and maintain than the alternative bridge, without  
24 fill, favored by appellants. In applying the Department of Ecology  
25 guidelines and the policy of the Shoreline Management Act,  
RCW 90.58.020 we measured the environmental effect of the proposed  
development giving no advantage for any financial superiority which it  
may have over any alternative development.

VIII

The substantial development permit granted by the Town meets the standards set out in Conclusion of Law IV, above, and should therefore be affirmed.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The substantial development permit granted by the Town of Steilacoom to Burlington Northern, Inc., and dated September 23, 1980, is hereby affirmed.

DONE at Lacey, Washington this 3<sup>rd</sup> day of April, 1981.

SHORELINES HEARINGS BOARD

Max W. Washington  
MAX W. WASHINGTON, Chairman

Rodney Kerslake  
RODNEY KERSLAKE, Member

A. M. O'Meara  
A. M. O'MEARA, Member

Steve Tilley  
STEVE TILLEY, Member